Supreme Court, U.S.
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In The
Supreme Court of the United States

DEJAN KOSTIC,
Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

* Marshal E. Hyman
Russell R. Abrutyn
MARSHAL E. HYMAN & ASSOCIATES
3250 W. Big Beaver
Suite 529
Troy, MI 48084

Fax 643-0798
248-643-0642

Attorneys for Petitioner

Counsel of Record

December, 2009

Appellate Advisors 312 Walnut Street Suite 1600 Cincinnati, OH 45202
513-762-7626◆◆◆◆800-279-7417

QUESTIONS PRESENTED FOR REVIEW

1. The Court of Appeals rejected all but one of the Immigration Judge's findings of fact in support of an adverse credibility determination in an asylum claim. Did the Court of Appeals violate the remand rule and exceed its authority on review by failing to remand to allow the agency to determine in the first instance whether the adverse credibility determination remained warranted in light of the Court of Appeals decision?

2. The Court of Appeals created a circuit split by failing to remand for a determination of whether Petitioner is eligible for humanitarian asylum after concluding that changed country conditions overcome the presumption that he has a well-founded fear of future persecution.

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8 U.S.C. § 1158(a)(1)	2
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PETITION FOR WRIT OF CERTIORARI

Petitioner Dejan Kostic respectfully petitions that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit entered in this case on July 8, 2009. The Immigration Judge ("IJ") and Board of Immigration Appeals ("BIA") relied on three perceived inconsistencies and a lack of corroborating evidence in denying Mr. Kostic's asylum application. The Sixth Circuit concluded that all but one of those findings are contrary to the substantial evidence in the record. The IJ and BIA did not claim that any of the reasons for disbelieving Mr. Kostic were sufficient standing alone, so the Sixth Circuit should have remanded to allow the agency in the first instance to determine whether the adverse credibility determination remained warranted.

The decision below is contrary to the Supreme Court's decisions in Gonzalez v. Thomas, 547 U.S. 183, 186 (2006) and Ventura v. INS, 537 U.S. 12, 16-17 (2002). The Sixth Circuit created a circuit split, as the Second, Third, Seventh, Ninth, and Eleventh Circuit Courts of Appeals have remanded in nearly identical circumstances. See Kueviakoe v. U.S. Attorney General, 567 F.3d 1301, 1306 n.4 (11th Cir. 2009); Kadia v. Mukasey, 501 F.3d 817 (7th Cir. 2007); Li v. INS, 453 F.3d 129, 136 (2d Cir. 2006); Singh v. Gonzales, 439 F.3d 1100, 1112 (9th Cir. 2006); Butt v. Gonzales, 429 F.3d 430, 437-38 (3d Cir. 2005).

OPINIONS BELOW

The opinions of the Sixth Circuit Court of Appeals, App., *infra*, A1 and B1, are unreported. The opinion of the Board of Immigration Appeals, App., *infra*, C1, is unreported. The decision of the Immigration Judge, App., *infra*, D1, is unreported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit, App., *infra*, A1, was entered on September 24, 2009. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

At all times relevant to this case, 8 U.S.C. § 1158 provided in relevant part:

(a) Authority to apply for asylum

(1) In general

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this

section or, where applicable, section 1225(b) of this title.

At all times relevant to this case, 8 U.S.C. § 1252(b) provided in relevant part:

(4) Scope and standard for review

Except as provided in paragraph (5)(B)—

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

At all times relevant to this case, 8 C.F.R. § 1208.13(b)(1) provided in relevant part:

(iii) Grant in the absence of well-founded fear of persecution. An applicant described in paragraph (b)(1)(i) of this section who is not barred from a grant of asylum under paragraph (c) of this section,

may be granted asylum, in the exercise of the decision-maker's discretion, if:

...

(B) The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.

STATEMENT

(i) Nature of the Case

This case presents two important and recurring questions. When the agency basis an adverse credibility determination on a combination of findings, neither of which are claimed to be sufficient standing alone, must a court of appeals remand if it rejects most of those findings as being contrary to the substantial evidence?

An asylum applicant who suffers past persecution is presumed to have a well-founded fear of future persecution. To rebut that presumption, the Department of Homeland Security ("DHS") must show by a preponderance of evidence that country conditions have changed. 8 C.F.R. § 1208.13(b)(1)(i). An applicant who lacks a well-founded fear of future persecution remains eligible for asylum if there is a reasonable

possibility that he will suffer other serious harm in his home country. 8 C.F.R. § 1208.13(b)(1)(iii)(B).

(ii) Factual Background

Dejan Kostic is a 37-year-old citizen of Serbia. He was lawfully admitted to the United States on November 12, 1994 as a nonimmigrant student. He was permitted to remain for the duration of his status. *Id.*

While still in valid nonimmigrant status, Mr. Kostic filed a timely, affirmative asylum application with the Immigration and Naturalization Service ("INS") on January 3, 1995.

Mr. Kostic's fell out of status on April 31, 1996. He filed a second asylum application two weeks later.

(iii) Agency Proceedings

Mr. Kostic's applications for asylum remained pending with the INS for almost ten years. On June 17, 2004, the DHS finally referred his asylum applications to the Immigration Court and alleged that he was removable because he remained in the United States longer than permitted, in violation of 8 U.S.C. § 1227(a)(1)(B).

In removal proceedings conducted in Detroit, Michigan, Mr. Kostic conceded his removability and renewed his applications for asylum and withholding of removal. In the first of many mistakes, Mr. Kostic's prior counsel "forgot" to file a document requesting protection under the Convention Against Torture, resulting in the abandonment of that claim. (Appx. 28-29). She also did not properly request a continuance, which Mr. Kostic was seeking because of the side effects of the caused by the medication he was taking for treatment after toxic waste was dumped on him at work.

Following a June 22, 2006, merits hearing, the IJ denied Mr. Kostic's applications and ordered him removed to Serbia and Montenegro[1]. App. D1. The IJ made an adverse credibility finding. She also concluded that Mr. Kostic could have submitted additional corroborating evidence. The IJ also concluded that the harm suffered by Mr. Kostic did not amount to persecution and that conditions have improved in Serbia so as to overcome his fear of future persecution.

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[1] When Mr. Kostic entered the United States, his country was called the Federal Republic of Yugoslavia. After 2003, it was called Serbia and Montenegro. This entity ceased to exist on June 3, 2006 when Montenegro declared its independence. https://www.cia.gov/library/publications/the-world-factbook/geos/mj.html (visited December 18, 2009). Serbia and Montenegro are now separate countries.

Accordingly, the IJ denied his applications and ordered him removed.

Mr. Kostic timely appealed to the BIA. While his appeal was pending, Mr. Kostic moved the BIA to remand based on Kosovo's declaration of independence and the resulting violence and rise of extreme nationalists in Serbia. On May 7, 2008, the BIA denied Mr. Kostic's appeal and motion. App. C1. The BIA held that the IJ's adverse credibility finding was not "clearly erroneous." *Id.* The BIA also agreed with the IJ's conclusion that Mr. Kostic did not adequately corroborate his claim. (BIA Decision, ROA 3, Appx. 2). The BIA held that Mr. Kostic lacked a well-founded fear of persecution based on his failure to serve in the military draft and improved country conditions. *Id.* The BIA denied Mr. Kostic's motion to remand after concluding that events in the former Serbian province of Kosovo did not relate to his fear of harm in Serbia. *Id.* The BIA found that Mr. Kostic's prior counsel abandoned any challenges to the denial of his request for a continuance because she did not raise it on appeal.

(iv) Petition for Review

Mr. Kostic timely petitioned for review to the Sixth Circuit. The Court denied his petition for review on July 8, 2009. App. B1. The rejected all but one of the findings relied on by the agency in support of the adverse credibility determination but nonetheless upheld that determination. The court also agreed that Mr. Kostic lacked a well-founded

fear of persecution because of changed country conditions. The court denied Mr. Kostic's petition for panel and en banc rehearing. App. A1.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's decision conflicts with decisions from the Supreme Court and other circuit courts of appeals. The court exceeded its authority on review by making de novo factual determinations within the agency's authority. The court should have remanded to allow the IJ and BIA to make those determinations in the first instance and to allow the agency to apply those findings to the law.

I. The Sixth Circuit Violated The Remand Rule By Making De Novo Factual Determinations

Below, the Sixth Circuit found that "several of the cited inconsistencies lack support in the record." In fact, the court found substantial evidence supported only one inconsistency, which was that Mr. Kostic and a letter from his friends inconsistently described the length of his detention in 1991, 15 years before his merits hearing.

The court went on to find that this single inconsistency was "not minor." App. B1. The IJ did not treat this inconsistency as sufficient, standing alone, to support her adverse credibility

determination. Rather, her decision was based on the aggregate of her findings, a conclusion that the BIA found was not clearly erroneous. App. C1 and D1.

The BIA and IJ are entrusted with the authority to make the initial determinations concerning asylum eligibility:

> Within broad limits the law entrusts the agency to make the basic asylum eligibility decision.

Ventura, 537 U.S. at 16.

As a general rule, the court of appeals lacks the authority to conduct a de novo review and reach its own conclusions. Id. The court of appeals is supposed to remand to allow the agency to further investigate or explain. Id.

The lower court violated the ordinary remand rule that the Court applied in Ventura and Thomas, *supra*. It substituted its own judgment about Mr. Kostic's credibility for that of the agency when it determined de novo that the single remaining inconsistency was "not minor" and that it was sufficient to support an adverse credibility determination. The IJ based her decision on the totality of her findings. It is not clear if the agency would find that the single remaining inconsistency is sufficient to disbelieve Mr. Kostic's entire claim, taking into account the passage of time, the otherwise consistent aspects of Mr. Kostic's

testimony, written application, and letter from his friend, and Mr. Kostic's industrial accident.

The lower court's unpublished decision conflicted with its published decision in an earlier case. Koulibaly v. Mukasey, 541 F.3d 613, 623 (6th Cir. 2008). As in this case, the Koulibaly Court rejected many but not all of the findings relied upon in support of an adverse credibility determination. Id. at 624. While recognizing the deference owed to the agency, the court remanded to allow the agency to reconsider the denial of the asylum claim. Id.

The lower court decision in this case creates not only an internal circuit split but it also conflicts with the decisions from other courts of appeals. In similar circumstances, the Seventh Circuit remanded because it was not confident that the IJ would have made that same adverse credibility determination had the IJ not committed several mistakes in assessing the evidence:

> there were a number of inconsistencies between the petitioner's testimony at the immigration hearing and the written statement that he had submitted earlier in support of his application for asylum, and in addition the documentary evidence that he submitted contained anomalies. A reasonable trier of fact could have concluded that the petitioner had lied about his political activities in

> Cameroon and their consequences. But the immigration judge made a number of mistakes, uncorrected by the Board, in his assessment of the evidence, and we cannot be confident that had he not made those mistakes he still would have disbelieved the petitioner. So although the doctrine of harmless error is applicable to judicial review of immigration decisions ... it cannot save the day for the government in this case.

Kadia, 501 F.3d at 821.

The Seventh Circuit rejected the doctrine, seemingly relied upon below, of *falsus in uno, falsus in omnibus* (false in one thing, false in all things). The court took issue with this "primitive psychology":

> Anyone who has ever tried a case or presided as a judge at a trial knows that witnesses are prone to fudge, to fumble, to misspeak, to misstate, to exaggerate. If any such pratfall warranted disbelieving a witness's entire testimony, few trials would get all the way to judgment.

Id.

The other circuits to have considered this issue have likewise remanded to allow the IJ and

BIA to reconsider adverse credibility findings. See Kueviakoe v. U.S. Attorney General, 567 F.3d 1301, 1306 n.4 (11th Cir. 2009); Li v. INS, 453 F.3d 129, 136 (2d Cir. 2006); Singh v. Gonzales, 439 F.3d 1100, 1112 (9th Cir. 2006); Butt v. Gonzales, 429 F.3d 430, 437-38 (3d Cir. 2005). These decisions recognized the initial authority of the IJ to make an adverse credibility determination. The Sixth Circuit overstepped its authority in Mr. Kostic's case by making this determination de novo. The court should have remanded the proceedings.

II. Because The Sixth Circuit Assumed That Mr. Kostic Suffered Past Persecution But Lacked A Well-Founded Fear Of Persecution, The Court Should Have Remanded To Allow The Agency To Determine Whether He Is Eligible For Humanitarian Asylum

After addressing the IJ's adverse credibility determination, the Court next assumed that Mr. Kostic suffered past persecution. App. B1. The Court agreed with the IJ and BIA that changed country conditions rebutted the presumption of a well-founded fear of persecution. Id.; 8 C.F.R. § 1208.13(b)(1)(i).

This does not end the analysis. An alien who suffered past persecution but who lacks a well-founded fear of future persecution remains eligible for asylum on a humanitarian basis if there is a reasonable possibility that he will suffer "other

serious harm." 8 C.F.R. § 1208.13(b)(1)(iii)(B). "Other serious harm" is "harm that is not inflicted on account of race, religion, nationality, membership in a particular social group, or political opinion, but is so serious that it equals the severity of persecution." 65 Fed. Reg. 76121, 76127 (2000). A "reasonable possibility" of future harm can exist where there is as little as a ten percent chance of the event happening. INS v. Cardoza-Fonseca, 107 S. Ct. 1207, 1217 (1987).

The Sixth Circuit and other circuits have directed the BIA to address asylum applicants' eligibility for humanitarian asylum under the "other serious harm" prong. Liti v. Gonzales, 411 F.3d 631, 641-42 (6th Cir. 2005). The BIA did not do so in this case because it concluded that Mr. Kostic did not suffer past persecution. App. C1. The lower court should have remanded to allow the agency to make findings of fact and conclusions of law with respect to Mr. Kostic's eligibility for humanitarian asylum.

There is virtually no case law defining "other serious harm" in the context of a humanitarian asylum claim, and this case would provide a good opportunity for the BIA to do so. Mr. Kostic is a long-term resident of the United States, he was injured in an industrial accident and requires follow-up care from a group of medical professionals, he could face punishment for refusing to serve in the Yugoslav Army, and he is from a country dominated by ultranationalists.

CONCLUSION

Petitioner respectfully submits that the Sixth Circuit erred in the following respects:

The Sixth Circuit violated the remand rule by failing to remand to allow the agency to determine whether the adverse credibility determination remained warranted in light of the circuit court's conclusion that all but one of the adverse credibility findings were contrary to the substantial evidence.

The Sixth Circuit violated the remand rule by failing to remand to allow the agency to determine whether Petitioner was eligible for humanitarian asylum.

Therefore, Petitioner respectfully prays that the Court grant his petition for writ of certiorari and reverse the decision of the Sixth Circuit Court of Appeals.

Respectfully Submitted,

/s/ Marshal E. Hyman
Marshal E. Hyman
Counsel of Record
Russell Reid Abrutyn

APPENDIX

SIXTH CIRCUIT COURT APPEALS FILINGS:

Order Denying Petition for Rehearing,
filed 09/24/09 ..... A1 - A2

Opinion,
filed 07/08/09 ..... B1 - B17

BOARD OF IMMIGRATION FILINGS:

Decision of the Board of Immigration,
filed 05/07/08 ..... C1 - C4

Oral Decision of the Immigration Judge,
filed 06/22/06 ..... D1 - D22

No. 08-3675

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEJAN KOSTIC,
Petitioner,

v. **ORDER**

ERIC H. HOLDER, JR.,
Respondent.

BEFORE: GILMAN and MCKEAGUE, Circuit Judges; and BARRETT,* District Judge.

The court having received a petition for rehearing en bane, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised

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*Hon. Michael R. Barrett, United States District Judge for the Southern District of Ohio, sitting by designation.

in the petition were fully considered upon the original submission and decision of the case.

Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green
Leonard Green
Clerk

NOT RECOMMENDED FOR PUBLICATION File Name: 09a0470n.06

No. 08-3675

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ON APPEAL FROM THE BOARD OF IMMIGRATION APPEALS

OPINION

DEJAN KOSTIC,
Petitioner,

v.

ERIC H. HOLDER, JR.,
Respondent.

Before: GILMAN and McKEAGUE, Circuit Judges; and BARRETT, District Judge.*

RONALD LEE GILMAN, Circuit Judge. Dejan Kostic is a native of the former Yugoslavia and a

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*The Honorable Michael R. Barrett, United States District Judge for the Southern District of Ohio, sitting by designation.

citizen of Serbia. He currently resides in Michigan, where he works as an electrician. Kostic timely filed an asylum application after he arrived in the United States as a nonimmigrant student in 1994. After an unexplained ten-year delay in processing, Kostic's application was referred to the immigration court, where his claims were adjudicated in a removal proceeding. The Immigration Judge (IJ) found that Kostic did not testify credibly and therefore did not meet his burden of showing that he is a refugee. This resulted in the IJ's order removing him to Serbia. Kostic appealed the IJ's decision to the Board of Immigration Appeals (BIA). The BIA affirmed, and Kostic now petitions for review of the BIA's order. For the reasons set forth below, we **DENY** the petition for review.

I. BACKGROUND

Kostic filed an application for asylum and withholding of removal within two months of his arrival in the United States. He filed a second asylum application in March 1995, this time attaching a document titled "Certificate" as evidence of his membership in an unnamed political party.

Kostic also attached written statements to both applications. In these statements, he described his membership in the spa (Serbian Renewal Movement), an opposition party to the Communists in the former Yugoslavia. He also described, among other things, two occasions when the Communist secret police allegedly arrested and beat him because of his democratic beliefs. Those two incidents lie at the heart of Kostic's asylum claim.

Kostic wrote that his "first experience with physical abuse by the . . . Communist secret police was in 1987," when he was a high school student. One day he declared at school that he "thought the time had come to stop the cult of adulation

surrounding the Communist dictator, Josip Broz Tito." According to Kostic, "[t]he following day [he] was picked up by the secret police and taken for questioning. [He] spent three days (October 5-8) in jail," where he was "severely beaten . . . with sandbags. . . all over [his] body but mostly on [his] back." Kostic stated that he "ha[s] experienced kidney problems [as a] result" of those beatings, as well as psychological difficulties, the result of the trauma suffered during those few days."

The second incident that Kostic described occurred approximately four years later, when he was a university student. He wrote that "in 1991, [he] joined the SPO, Serbian Renewal Movement[,]" and he explained that the spa was the strongest opposition party at that time to Slobodan Milosevic's Communist Party. According to Kostic, he organized a group of science students at his university to attend a protest in Belgrade that was scheduled for March 9, 1991. He wrote that he "arrived in Belgrade the night before and . . . spent the night in the SPO Headquarters. . ." making final preparations for the protest.

Kostic explained that the protest began as planned, but quickly turned tragic. He said that an "enormous," "fully armed" police force with army tanks arrived and began beating the protestors. When the protesters fought back, many of them were killed by the police. Kostic "was rounded up with a group of protesters" and taken to a jail. His written statement described the events that followed in considerable detail. He wrote that while he waited to be interrogated, passing officers "kick[ed him] or hit [him] with a club" and called him and the other protestors names, including "scum," "traitor," and "criminal." Kostic then described a lengthy and brutal interrogation that culminated with his being "hosed down with fire hoses" and made to stand outdoors overnight in a stiff wind and freezing temperatures. He wrote that he was "released the next day, March 10."

For reasons unexplained in the record, no action was taken on Kostic's application for nearly ten years. In June 2004, the Department of Homeland Security (DHS) finally served Kostic with a Notice to Appear in immigration court. The notice to appear alleged that Kostic had remained in the United States beyond the temporary period for

which he had been admitted and charged him with removeability pursuant to 8 U.S.C. § 1227(a)(1)(B).

In November 2004, Kostic suffered a serious injury at work when a dump truck dropped waste water on him. The force of the water caused him to strike his head and neck against a high-voltage cable. Kostic received long-term treatment for his injuries, including prescription medication to treat his ongoing neck and lower-back symptoms.

The IJ reviewed Kostic's applications at a hearing in July 2006. After conceding that he was removable, Kostic pursued his applications for asylum and withholding of removal. Kostic's attorney requested a continuance because of Kostic's medical condition. The IJ denied the request because no evidence other than Kostic's own statements demonstrated that his medication adversely affected his ability to remember or concentrate in any way.

Kostic served as the sole witness in support of his claim. During the brief direct examination by his counsel, Kostic's attorney neglected to ask him

about the first incident of alleged physical abuse in 1987. But his attorney did inquire about the second incident in 1991, which Kostic again described. He stated that he had organized a group of university students to travel on behalf of the SPO to "a big demonstration" on March 9, 1991. When asked what happened to him at the demonstration, he said that there was a "huge massive attack" by government officers and that he was arrested and beaten. In addition, Kostic testified that the weather was cold, "around zero degrees centigrade," and that officers threw cold water on him.

The IJ issued an oral decision denying Kostic's application and ordering him removed to Serbia. She found that Kostic had not testified credibly, citing several inconsistencies in his testimony and in his written documentation. The IJ also found that, even if Kostic had been able to establish through credible testimony that he had experienced past persecution, his application must nonetheless be denied due to changed country conditions. Kostic appealed the IJ's decision to the BIA, which affirmed the denial of his application in a two-paragraph written decision. The BIA "f[ou]nd

that the Immigration Judge did not clearly err in finding that [Kostic] was not credible in his testimony below given the inconsistencies between his testimony, his two asylum applications, and his documentary submissions. Thus, [Kostic]'s asylum application was properly denied because of the adverse credibility determination." The BIA went on to state that "the conditions in Yugoslavia have changed dramatically since [Kostic] left because Milosevic is no longer in power." With respect to the denial of Kostic's motion for a continuance, the BIA held that the issue had been abandoned because it was not addressed in Kostic's appellate brief to the agency.

Kostic now petitions this court for review of the BIA's decision. He argues, among other things, that the record compels the conclusion that he was credible and that he has a well-founded fear of future persecution because of his past political activities in Serbia.

II. ANALYSIS

A. Standard of review

"Because the BIA adopted the IJ's decision with additional commentary, we review the decision of the IJ, as supplemented by the BIA, as the final administrative order." *Ceraj v. Mukasey*, 511 F.3d 583, 588 (6th Cir. 2007). Questions of law involving immigration proceedings are reviewed de novo. *Ali v. Ashcroft*, 366 F.3d 407,409 (6th Cir. 2004). We will not disturb the IJ's factual findings, or a determination that the petitioner failed to establish eligibility for asylum or withholding of removal, if substantial evidence supports such rulings. *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992) (holding that a factfinder's rulings will be upheld if "supported by reasonable, substantial, and probative evidence on the record considered as a whole"). Under this standard, we will not reverse a factual determination of the IJ unless we find "that the evidence not only supports a contrary conclusion, but compels it." *Marku v. Ashcroft*, 380 F.3d 982, 986 (6th Cir. 2004) (emphasis in original).

B. Legal framework

Under the Immigration and Nationality Act (INA), 8 U.S.C. § 1158(a), the US. Attorney General has the discretion to grant asylum to a "refugee." *Perkovic v. INS*, 33 F.3d 615, 620 (6th Cir. 1994). The disposition of an application for asylum involves a two-step inquiry: (1) whether the applicant qualifies as a "refugee" as defined in 8 U.S.C. § 1101 (a)(42)(A), and (2) whether the applicant "merits a favorable exercise of discretion by the Attorney General." *Id.* (citing *INS v. Cardoza-Fonseca*, 480 US. 421, 428 n.5 (1987)).

Section 1101(a)(42)(A) of the INA defines a "refugee" as an alien who is unable or unwilling to return to his or her home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." An applicant may therefore establish eligibility for asylum by showing that he or she (1) has suffered past persecution, or (2) has a well-founded fear of future persecution. 8 C.F.R. § 208.13(b). The burden is on the applicant to establish that he or she qualifies as a refugee. 8

C.F.R. § 1208. 13 (a)-(b). If credible, the applicant's testimony "may be sufficient to sustain the burden of proof without corroboration." 8 C.F.R. § 1208.13(a).

Once an applicant shows that he or she has suffered from past persecution, the applicant is presumed to have a well-founded fear offuturepersecution. *Mikhailevitch v. INS*, 146 F.3d 384, 389 (6th Cir. 1998). This presumption can be rebutted by the government "only through establishing by a preponderance of the evidence that since the persecution occurred, conditions in the applicant's country have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted if he were to return." *Id.* (citation and internal quotation marks omitted).

C. The IJ's adverse credibility determination

Credibility determinations are findings of fact that we review under the "substantial evidence" standard. *Yu v. Ashcroft*, 364 F. 3d 700, 703 (6th Cir. 2004). "Credibility encompasses not just consistency but also plausibility and sufficient

detail." *Dorosh v. Ashcroft*, 398 F.3d 379, 382 (6th Cir. 2004). A credibility finding, like other factual findings, will be reversed "only if any reasonable adjudicator would be compelled to conclude to the contrary." *Yu*, 364 F.3d at 703 (quoting 8 U.S.C. § 1252(b)(4)(B)) (internal quotation marks omitted).

The IJ supported her adverse credibility determination by citing various perceived inconsistencies in Kostic's testimony and his written materials. We find that several of the cited inconsistencies lack support in the record. For example, the IJ stated in her decision that Kostic "was unable to recall the name" of his political party, the SPO. In fact, the transcript of the hearing reveals that when Kostic was first asked on direct examination what the SPO "stand[s] for," he reasonably responded by describing its democratic political principles. His counsel then clarified that she was asking what the *initials* stood for, and Kostic clearly stated: "Serbian Movement." Although Kostic did not respond with the full translated name of the organization in English (Serbian Renewal Movement), the IJ's statement that Kostic was unable to recall the name of his party is plainly inaccurate. Neither the IJ nor

Kostic's attorney followed up by asking him for the complete name.

Our examination of the record reveals that several of the other inconsistencies cited by the IJ similarly lack support. But because one fatal flaw in Kostic's case precludes the conclusion that the IJ's credibility determination is not supported by substantial evidence, we have no need to discuss each purported inconsistency. *See id.*

The flaw in question relates to the length of Kostic's alleged detention in March 1991. Kostic submitted a document in support of his claim titled "Certificate." The document was written in the Serbo-Croatian language and was accompanied by an English translation. Although the signature on the document is illegible, Kostic testified that it was written by "friends" of his who were members of the spa party. The document reads, in part:

> Dejan Kostic is a member of our party. As an activist at the University of Novi Sad, School of electrical engineering, he took active part in the demonstrations in Belgrade, on March 1991 [sic]. As a result he was detained.

> In the course of his stay in pretrial confinement, while interrogated, he was physically and psychologically tortured and he suffered physical injuries. *He was detained from March 11, 1991 to March 24, 1991.*

(Emphasis added.) In contrast, Kostic's written statement in support of his asylum application alleged that he was detained by police on March 9, 1991 and released "the following day." Inconsistent with both of these time frames is Kostic's testimony at his asylum hearing that he was detained "for three days."

Although "a minor inconsistency . . . taken alone 'would be an inadequate basis for an adverse credibility finding[,]" *Ben Hamida v. Gonzales*, 478 F.3d 734,738 (6th Cir. 2007) (quoting *Yu*, 364 F.3d at 704), the differences here are not minor. Kostic himself was inconsistent as to whether he was detained for three days or only overnight. And the statement that he submitted from his "friends" states that he was detained and tortured for thirteen days-or nearly two weeks. These discrepancies regarding the length of Kostic's detention "go to the heart of' his claim that he was

persecuted by the police. *See Chen v. Gonzales*, 447 F.3d 468,472 (6th Cir. 2006).

When the IJasked Kostic to explain "why [he] would submit a document which is extremely inconsistent with [his] sworn statements," Kostic offered no explanation. The judge read from the document and pointed out to Kostic that "[i]t says that you were detained for nearly two weeks." Kostic replied that he "d[id]n't quite remember." The IJ then asked whether "[i]t would be fair to say . . . that [the] document [was] not consistent with the claims [he] made" in his asylum application. Kostic responded, "I guess so."

In light of the "high degree of deference" that we must give to the factual determinations of the U, the inconsistencies in Kostic's testimony and written submissions leave us with little choice but to uphold the adverse credibility determination. *See Sterkaj v. Gonzales*, 439 F.3d 273,278 (6th Cir. 2006) (upholding an IJ's adverse credibility determination where an asylum applicant submitted an inconsistent document without explanation). Because Kostic cannot overcome the IJ's finding regarding his lack of credibility, he cannot prove

that he is eligible for asylum. This also means that he cannot meet the more stringent standards required to qualify for withholding of removal. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 431-32 (1987) (holding that the asylum standard for past persecution or well- founded fear of future persecution is lower than the "clear probability" standard to show eligibility for withholding of removal).

D. Changed country conditions

The IJ and the BIA further rested their denial of Kostic's application for asylum on the alternative ground that country conditions in Serbia have changed. Evidence submitted by both Kostic and the government shows that, since Kostic left his country, the one-party Communist system headed by Milosevic has been overthrown and multiparty democracy established. According to the IJ and the BIA, these changed conditions demonstrate that Kostic no longer has an objectively reasonable fear of future persecution if he returns to the former Yugoslavia (now Serbia).

The record does not compel a contrary conclusion. In sum, even if we assumed that Kostic was credible and that his detentions in 1987 and 1991 amounted to past persecution, we would still deny his petition because the government has rebutted the presumption of a well-founded fear by showing that country conditions have changed dramatically. *See Mikhailevitch v. INS*, 146 F. 3 d 384, 389 (6th Cir. 1998)

III. CONCLUSION

For all of the reasons set forth above, we **DENY** Kostic's petition for review.

U.S. Department of Justice
Decision of the Board of Immigration Appeals
Executive Office for Immigration Review

Falls Church, Virginia 22041

==========

File: A73 419 095 - Detroit Date: May 07, 2008

In re: DEJAN KOSTIC

IN REMOVAL PROCEEDINGS

APPEAL and MOTION

ON BEHALF OF RESPONDENTS:
Marshall E. Hyman, Esquire

ON BEHALF OF DHS:
Thomas O. Martin
Assistant Chief Counsel

CHARGE:

Notice:	Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] - In the United States in violation of law
APPLICATION:	Asylum; withholding of removal

The respondent, a native of Yugoslavia and citizen of Serbia, appeals from a June 22, 2006, Immigration Judge decision denying his applications for asylum under section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158; and withholding of removal under section 241 (b)(3) of the Act, 8 U.S.C. § 123 1(b)(3). The Immigration Judge found that the respondent was not credible and did not meet his burden of proof. She denied all relief on these bases. The Immigration Judge also denied the respondent's motion to continue proceedings because it was offered on the day the respondent was supposed to testify, but related to a years-earlier industrial accident. On appeal, the respondent asserts that the Immigration Judge "abused her discretion" by finding that (1) he was not credible, and (2) he failed to demonstrate past persecution or a well-founded fear of future persecution. The respondent does not address the denial of his request for a continuance and we deem that issue abandoned. After the respondent filed his brief on appeal, he filed an untimely motion to remand, claiming a "stale record" due to Kosovo's recent declaration of independence.

As to the respondent's credibility, the Board only reverses a finding of credibility by an Immigration Judge if it is "clearly erroneous." 8 C.F.R. § 1003.1(d)(3)(i). This clearly erroneous standard does not entitle the reviewing body to reverse the finding of a trier of fact merely because the reviewing body is convinced it would have decided the case differently. *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564,574 (1985). When there are two permissible views of the evidence, the fact-finder's choice between the two cannot be deemed clearly erroneous. *Id.* In this instance, we find that the Immigration Judge did not clearly err in finding that the respondent was not credible in his testimony below given the inconsistencies between his testimony (Tr. at 25-55), his two asylum applications (Exhs. 2, 5), and his documentary submissions (Exh. 4). Thus, the respondent's asylum application was properly denied because of the adverse credibility determination. Even assuming credibility, we find that the respondent failed to adequately corroborate his claim of past persecution. Again, presuming credibility, there is a possibility that the respondent might be subject to prosecution upon his return to Serbia for failing to serve in the army,

but he has not established a well-founded fear of future persecution. Further, the conditions in the former Yugoslavia have changed dramatically since the respondent left because Milosevic is no longer in power. Inasmuch as the respondent has failed to satisfy the lower burden of proof required for asylum, it follows that he also has failed to satisfy the clear probability standard of eligibility for withholding of removal. *Matter of E-P-*, 21 I&N Dec. 860, 863-64 (BIA 1997). Finally, we will deny the respondent's motion to remand because he did not provide how, if at all, Kosovo's recent declaration of independence relates to his alleged risk of persecution on account of political opinion or membership in a particular social group.

Accordingly, the following orders will be issued:

ORDER: The respondent's appeal is dismissed

FURTHER ORDER: The respondent's motion to remand is denied.

/s/ Frederick D. Hess
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
U.S. IMMIGRATION COURT Detroit, Michigan

File A 73 419 095 June 22, 2006

In the Matter of

IN REMOVAL PROCEEDINGS

DEJAN KOSTIC,
Respondent

CHARGE: Section 237(a)(1)(B) of the Immigration and Nationality Act, as amended - remained longer after" admission as a non-immigrant. "

APPLICATION: Asylum, withholding of removal.

ON BEHALF OF RESPONDENT:
Francyne Stacey, Esquire
Attorney at Law
24 Frank Court Wright Drive
Ann Arbor, Michigan 48105

ON BEHALF OF DEPARTMENT:
Thomas Martin, Esquire
Assistant Chief Counsel
333 Mount Elliot
Detroit, Michigan 48207

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent is a male who is a native of Yugoslavia and citizen of Serbia Montenegro. The Department of Homeland Security (DHS), initiated proceedings against the respondent pursuant to authority contained in Section 240 of the Immigration and Nationality Act (hereinafter "the Act"). Proceedings were commenced with this Court by the filing of the Notice to Appear (Exhibit 1). 8 C.F.R. 1003.14(a).

In a hearing before the Court, the respondent, through counsel, admitted as alleged in the Notice to Appear that he's not a citizen or national of the united States, but rather a native of Yugoslavia and citizen of Serbia Montenegro. The respondent further admitted that he came to the United States on or about November 12, 1994 as a non-immigrant student who was authorized to remain in the united States for a temporary parade not to exceed April 31, 1996 and remained beyond that date without authorization from the then Immigration and Naturalization service. The respondent conceded he was subject to removal as set forth above. Based upon the respondent's

admissions, the Court finds the charges of removability have been established in this case by clear and convincing evidence. See Section 240© (3) of the Act. The respondent declined to designate a country to which removal would be directed and Serbia has been directed by the Court. The respondent requested the opportunity to renew his application before the court for asylum and withholding of removal under Section 241(b)(3) of the Act[1].

The respondent in this case has satisfied the requirement of Showing that his application was first made in 1994 and he is, therefore, exempted from the provisions of Section 20B(a) (2) (B) of the Act. The respondent was advised of the consequences of knowingly filing a frivolous application for asylum. 8 C.F.R. 1208.20.

Prior to the admission of the application for asylum, the respondent was given the opportunity

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[1]At today's hearing, the respondent has confirmed that he does not seek protection under Article 3 of the Convention Against Torture and further has stated that he does not seek the relief of voluntary departure.

to make changes, alterations or corrections to the document.[2]

The respondent swore before the Court that he knew the contents of his applications for asylum, including all attachments and supplements made by him or on his behalf and that they were true and correct.

RESPONDENT'S CLAIM

The respondent's claim is premised upon his fear of returning to his country because of his political opinion (See Exhibit 5, part B, question 4). The respondent also asserts that that he fears return because of his membership in a particular

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[2]Initially, the respondent signed the first application he submitted to the INS in 1995. See Exhibit 2. Thereafter, Government counsel has indicated the respondent's second application, See Exhibit 5, was made part of the record, however not referred to in this Court. Copies of that application and the underlying submission of a certificate from "friends" on the respondent, See Exhibit 5, See also Exhibit 4, Tab 12 were then made part of the record in this case.

social group. The respondent states that he and his family were mistreated in Serbia due to their political opinion and membership in a particular social group. The respondent states that he has been arrested, detained and interrogated and refers to a statement submitted as further details of this. See Exhibit 4, Tab 13. In his statement, the respondent states that she is family had a history of persecution under Tito, beginning in 1945.

He states that he, himself, experienced persecution, noting that in 1987 while in high school, he was picked up by the Communist secret police. In his statement, he claims to have been severely beaten and scared. He also states that he was beaten with sandbags, etc.. The respondent states that he experienced physical problems after that in his statement.

The respondent goes on to state that in University in 1991, he joined the "SPO", which he describes as an opposition group to the Communist Party. He states that he was an active member organizing a demonstration in Novistad in March of 1991. He's organizing the students of technical science of the Novistad University, where he

attended, arranging transportation and participation in a rally in Belgrave.

In his statement, the respondent states that they attended the rally in Belgrave. However, protesters were arrested. There were 12 individuals with him who were arrested and taken to jail in padinska Skela, approximately 20 miles from Belgrave. The respondent states that they were beaten, thrown into an area where they were beaten by the authorities, called criminals, traitors, etc.

In his statement submitted with his application, the respondent states he was released the next day on March 10 after additional demonstrations took place requesting the release of all detainees. See Exhibit 4, Tab 13, page 4.

The respondent claims that he refused to join the military after being released and he was, at that time, ordered to join a troop of military reservists. He states that his refusal to join the federal army made him a deserter during the Milosovich regime with severe consequences for himself and his family. The respondent states his

mother lost her job, he was expelled from the University and went into hiding in Montenegro until he was able to get in as a visa. The respondent claims that members of the Communist Party secret police regularly visited his family and that Slovodan Milosovich has cracked down on all opposition. See Exhibit 4, Tab 13, page 4.

STATEMENT OF THE LAW

The respondent bears the evidentiary burdens of proof and persuasion in the applications before this Court. See Matter of Acosta, 19 I&N Dec. 211 (BIA 1985); Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987).

In order to establish eligibility for asylum based on a well-founded fear persecution, the respondent must establish that he has a fear of persecution in his country of nationality or last habitual residence based upon his race, religion, nationality, membership in a particular social group or political opinion. The respondent must establish there's a reasonable possibility of suffering persecution should the respondent return. The respondent must establish that he is unable or

unwilling to avail himself of the protection of the country because of such fear. 8 C.F.R. 1208.13(b)(2)(I).

The test for asylum has both an objective and subjective component. See Perkovic v. INS, 33 F. 3d 615, 620-21 (6th Cir. 1994). The applicant "must actually fear he would be persecuted upon return to his country and present evidence which establishes an "objective situation" under which that fear can be deemed reasonable. *Id*. 620-21.

While the Act provides no definition of "persecution", in Mikhailevitch v. INS, 146 F. 3d 384 (6th Cir. 1998), the court determined that persecution wi thin the meaning of Section 101(a)(42)(A) requires more than a few isolated incidents of verbal harassment or intimidation, accompanied by physical punishment, infliction of harm or significant deprivation of liberty. Id. 393.

The regulations provide that with respect to past persecution, an alien who establishes past persecution within the meaning of the Act is presumed to have a well-founded fear of future persecution, unless a preponderance of evidence

establishes that since the time the persecution occurred, conditions in the applicant's country have changed to such an extent that the applicant no longer has a well-founded fear persecution should he return. See 8 C.F.R. 1208.13(b). Once changed circumstances have been established, the burden shifts to the respondent to show the reasonableness of his fear from any new source of harm. Matter of N-M-A-, 22 I&N Dec. 312 (BIA 1998). Unless the alien establishes a well-founded fear of persecution from this new source of harm, the alien's application for asylum will be denied, absent compelling reasons otherwise based upon the past persecution. See e.g. Matter of Chen, 20 I&N Dec. 16 (BIA 1989) .

It should be noted the well-founded fear standard required for asylum is more generous than "clear probability" standard for withholding of removal. See INS v. Cardoza-Fonseca, 480 U.S. 421 (1987). An alien seeking withholding of removal from a country under the provisions of Section 241 (b) (3) must show through facts a "clear probability" that his life or freedom would be threatened in the country directed for removal on account of race, religion, nationality, membership

in a particular social group or political opinion. INS v. Stevie, 467 U.S. 413 (1984). Mikhailevitch v. INS, supra. "Clear probability" means that the respondent's facts must establish it is more likely than not he'd be subject of persecution on one of the grounds specified.

CREDIBILITY AND ANALYSIS OF FACTS

In all applications for relief, the Court must make a threshold determination of credibility. See Matter of O-D-, 21 I&N Dec. 1079, 1081 (BIA, 1998); See also (Indiscernible) 22 I&N Dec. 1328, 1331 (BIA 2000). Sometimes an applicant's own testimony can be sufficient to meet the burden, where it is believable, consistent and sufficiently detailed to provide a plausible and coherent account of the basis for the fear. See Matter of Dass, 20 I&N Dec. 120 (BIA 1984); See also 8 C.F.R. 1208.13(a). However, testimony is not considered credible when it is inconsistent, contradicted by current country conditions or inherently improbable. See Matter of S-M-J-, 21 I&N Dec. 722, 729 (BIA 1997).

The respondent today states that he suffered an industrial accident while in the United States.

Today, the respondent's counsel has come to the court and requested a continuance for a first-time, based upon the respondent's effects of medication. No medical statement from a doctor relating to the respondent's inability to testify has been presented. What has been presented for the first time at 9:00 a.m. today is approximately one inch of various records, reviews, reports from a variety of doctors, reports from workers compensation and a copy of an appointment list, appointments for June and July, although the year is not specified, as well as a patient prescription information statement, apparently provided with medication called Tramadol. The respondent claims that side effects from this medication may affect his ability to testify. Side effects which are listed include dizziness, weakness and coordination (sic), nausea or vomiting, stomach upset, constipation, headache, drowsiness, anxiety, irritability, dry mouth or increased sweating. The respondent has not submitted a letter from the physician indicating that the respondent has suffered from the side effects of such medication. Moreover, it appears that the accident which apparently occurred in this case which affected the respondent, occurred sometime in about

November 3, 2004. The most recent information of doctors reports submitted in this case is in January 2006. This Court has local operating procedures which require the submission of a request for a continuance two weeks prior to hearing. No such request was made. The most recent apparent submission of a refill for a prescription appears to have occurred on June 5, 2006, since that is the date of the tear sheet from the patient information sheet submitted. The respondent certainly could have submitted evidence of his side effects from medication or inability to testify well within the 14-day period. The Government opposed the continuance in this case, since there's very little in the submission submitted at 9:00 a.m. today which indicates that the respondent has any difficulty in recalling and memory or that he is affected by the accident so as to impede his ability to testify in the case. Based upon this, the Court has denied the continuance.

The Court does note, however, the respondent has stated during the course of his testimony that where inconsistencies occurred, that he believes these may have been caused by his medication.

There are inconsistencies, not only in the testimony in this case, but also in the documentary evidence which has been submitted. First, the respondent testified at length during his direct examination, stating that he was a member of the SPO. When asked several times by his Congress what the initials stood for, the respondent had stated that it was an anti-Communist Party, it was the opposition Party and he participated in demonstrations. He was unable to recall the name of the organization. This may be due to his memory problems. However, the respondent did testify that he participated in this organization, organizing a large demonstration in 1991 for the University of Novistad, where he resided. On March 9, 1991, he testified that special police came to the demonstration, he was arrested, thrown into a cell, which was extremely cold, describing it as 0·C, cold water was thrown upon him, he was tortured and beaten, he was detained for three days and then released after they forced him not to say where he had been detained during this period. He stated, when asked by his counsel is what he had to do to release, that he didn't have to sign in the letters, but he was told not to mention what he had suffered, either physically or psychologically.

He stated that after he was released in March 1991, he continued with the SPO, however, was eventually expelled by the university sometime in 1992. He stated he was given no explanation for the expulsion by the administrative board of Novistad University, but told to find another part of the University in which to participate. The respondent claims other students were given letters expelling them and asserts that they were also members of the SPO.

The respondent claims that his mother was fired from her employment because of his political problems. He testified that in 1994, he came to the united States on a student visa, attending school in Ann Arbor in a language school.

The respondent testified that he never served in the military, although it was required, because students were not required to participate in the military service. The respondent made no mention of being told in 1991 to join the military reservists. See Exhibit 4, Tab 13, statement.

Moreover, the respondent, in his testimony, claims his detention occurred on March 9, 1991.

The respondent has submitted documentary evidence, that isa statement attached to his 1996 application for asylum, See Exhibit 4, Tab 13, which states that he was arrested on March 10 and detained for only one day. As noted herein, the respondent claims that this may be due to his bad memory.

The respondent has also submitted, See Exhibit 5, attachment, a copy of a document purportedly obtained from the SRO, which states that he was actually detained on March 11, 1991 and detained until March 24, 1991 when he was released. See also Exhibit 4, Tab 12. The respondent's testimony today certainly is inconsistent, but more importantly, the respondent's submission in 1995, prior to his memory impairment and the documents which he submitted to the Immigration Service, were also inconsistent and contained misstatements and statements which were contradicted by an earlier application. See Exhibit 2. The respondent, in his first application submitted to the Immigration service, states that he was arrested on March 9, 1991, when he participated in mass demonstrations. He also goes on to state that he and other demonstrations

were taken to what he describes as "interrogation" jail in Padinska Skela", where they were beaten and hosed down with fire hoses, forced to spend the night outdoors in a stiff wind. The respondent states, in that application, they were released on March 10 after additional demonstrations in Belgrave occurred.

In both of the applications filed with the Immigration Service, See exhibits 2 and 5, the respondent claimed that he refused to join the federal army in 1993, making him a deserter with consequences to himself and his family. The respondent, in the first application he filed, states that he was expelled from Novistad University because of his refusal to join the military. Today, the respondent stated that he was expelled from the Novistad University in 1992, not 1993, because of his political opinion. While there certainly can be some allowance made for memory problems, these are significantly different from the testimony and the evidence offered in the two statements. See Exhibit 5 and Exhibit 4, Tab 13, Exhibit 2 attachments. The respondent quite simply has presented inconsistent applications and documentary evidence which is inconsistent with the claims made. The Board has

held that where a respondent provides evidence which is determined, forensically, to be false, that it casts doubt on the balance of the respondent's testimony. Here, the respondent has submitted a document which, on its face, is so inconsistent as to be a false or fraudulent document. See Exhibit 5 attachment, Exhibit 4, Tab 12.

Even factoring in the respondent's claim of memory issues, the respondent has presented applications and testimony which is seriously inconsistent so as to give rise to a finding that the respondent's statements here are not credible. The respondent has not presented corroborative evidence of his claims. The respondent was questioned concerning the evidence which he provided, See Exhibit 5 and Exhibit 4, Tab 12, and today states that it is not evidence from his organization, the SPO, but rather friends whom he contacted. This explains the lack of any identifying organizational statements on the document.

The respondent has presented a copy of a translation of a decision supposedly issued December 29, 1999. The original Serbian document has not been submitted, See Exhibit 4, Tab 15, and

the Court cannot take any weight in that. There's also a letter from an attorney, See Exhibit 4, Tab 16, which states that Mr. Kostic did not regulate his service life and is regularly requested to go gave the military authorities. It goes on to state that since he has been engaged in an electrical engineering company, criminal proceedings were conducted against him in a military section District Court in Novistad and he might be arrested upon return. The certificate was apparently issued for Mr. Kostic to regulate his status in the United States and is dated February 24, 2006. See Exhibit 4, Tab 16.

Even assuming for the sake of argument that this was a credible claim that was made on political grounds or upon military grounds, the Government has presented a significant body of evidence, as has the respondent, of changed circumstances in this country, should he return. See Exhibit 3. See also Exhibit 4, Tab 15. As noted in Tab 8, a series of Country Reports from the Department of State from 1998 to 2005, Slovodan Milosovich is no longer the president of Serbia and the government has significantly changed through time. As the reports indicate, there was an amnesty for individuals who refuse to serve in the 1990s

under Milosovich or who deserted from the military. The special operations or secret police have been disbanded. See Exhibit 4, Tab 8, Country Reports 200, page 1. And the 2003 report make it clear, particularly the efforts taken, including the free operation of human rights groups investigating and publishing findings, the Corporation of government officials with human rights groups and non-governmental organizations to improve the human rights in Serbia.

The respondent has, quite simply, not submitted credible evidence on the claim of political persecution. And with respect to charges brought against him on the basis of his failure to report from military service, the courts have long held that the invasion of the country's military laws, without more, is insufficient to support a claim for asylum. See e.g., Mekhoukh v. Ashcroft, 358 F. 3d 118, 125-128 (1st Cir. 2004). Indeed, the Seventh Circuit found that the refusal to serve in the universally condemned Serbian army, without more, was insufficient, without showing punishment for refusal to serve, was insufficient to support a claim for asylum. See Mojsilovic v. INS, 156 F. 3d 743 (7th Cir. 1998); See also Matter of A-G-, 19 I&N Dec.

502 (BIA 1997), (Indiscernible) 899 F. 2d 304 (4th Cir. 1999) (en banc) (failure to serve in the military not persecution unless a disproportionately severe punishment imposed). In the instant case, the respondent notes that even taking the supposed letter of the attorney at full faith and credit, at most he would be subject to prosecution for failure to report for military service. He submitted no evidence of punishment in this regard. The Court cannot find that the respondent has met his burden of establishing eligibility on this ground.

The respondent seeks protection under the laws of asylum on the basis of his membership in a particular social group. The respondent has not submitted any evidence to establish what social group he asserts membership in. While the definition of a social group is flexible, encompassing a wide variety of group, the respondent must establish an innate or common characteristic that defines the "social group" as one at the respondent cannot change, nor should be required to change because it is fundamental to individual identity or conscience. Matter of Acosta, 19 I&N Dec. 233-34. The touchstone defining the social group under Board precedent

cannot be the reaction by persecutors two members of the group. (Indiscernible) 341 F. 3d 533, 548 (6th Cir. 2003). While the burden of proof does not require the respondent seeking to identify with the group be singled out individually, he can show a pattern or practice of persecution of others similarly situated. The respondent, however, must show evidence to show persecution of others similarly situated. 8 C.F.R. 1208.13(b)(2). The respondent here has simply not shown a pattern or practice of persecution of a social group with which he identifies.

Based upon the foregoing, both for reasons of credibility and for reasons that the respondent has failed to meet a standard necessary to establish as persecution, the Court cannot find that the respondent has established eligibility for the relief of asylum.

Having determined that the respondent is not eligible for asylum, it follows the respondent is not eligible for the relief of withholding of removal. Based upon this, the application will be denied.

There is no other relief before the Court. Having reached the determination the respondent is not eligible for relief, the following order will be entered.

ORDER:

IT IS ORDERED that the respondent's applications for asylum, withholding of removal and nnder the Convention Against Torture be and hereby are denied and

IT IS FURTHER ORDERED the respondent shall be removed and deported from the United States to Serbia Montenegro on the charges contained in the Notice to Appear.

/s/ Elizabeth A. Hacker
ELIZABETH A. HACKER
U.S. Immigration Judge
June 22, 2006

No. 09-774

In the Supreme Court of the United States

DEJAN KOSTIC, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
DONALD E. KEENER
JOHN W. BLAKELEY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly denied the petition for review when it held that record evidence failed to compel reversal of the adverse credibility determination, even though it rejected certain aspects of that credibility determination.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B17) is not published in the Federal Reporter but is available at 340 Fed. Appx. 249. The decisions of the Board of Immigration Appeals (Pet. App. C1-C4) and the immigration judge (Pet. App. D1-D22) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 2009. A petition for rehearing was denied on September 24, 2009 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on December 23, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the Secretary of Homeland Security or the Attorney General may, in their discretion, grant asylum to an alien who demonstrates that he is a "refugee." 8 U.S.C. 1158(b)(1)(A). The INA defines a "refugee" as an alien who is unwilling or unable to return to his country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A).

An applicant for asylum bears the burden of demonstrating that he is eligible for that form of relief. 8 U.S.C. 1158(b)(1)(B)(i). Under the Attorney General's regulations, an alien who has demonstrated that he has suffered past persecution "shall also be presumed to have a well-founded fear of persecution." 8 C.F.R. 1208.13(b)(1). That presumption may be rebutted, however, if an immigration judge (IJ) makes certain specified findings. As pertinent here, the regulations provide that the presumption of a well-founded fear of future persecution that arises when an alien demonstrates that he has been subject to past persecution is rebutted if the government establishes by a preponderance of the evidence that "[t]here has been a fundamental change in circumstances" in the alien's country of origin "such that the applicant no longer has a well-founded fear of persecution." 8 C.F.R. 1208.13(b)(1)(i)(A); see 8 C.F.R. 1208.13(b)(1)(ii).

The Attorney General's regulations also provide that there are limited circumstances in which an IJ may nonetheless grant asylum where an alien has demonstrated past persecution but the government has suc-

ceeded in rebutting the presumption of a well-founded fear of future persecution that arises from that showing. Subject to certain exceptions not at issue here, the regulations state that an IJ has "discretion" to grant asylum in those circumstances if:

> (A) The applicant has demonstrated compelling reasons for being unwilling or unable to return to [his or her] country [of nationality] arising out of the severity of the past persecution; or
>
> (B) The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.

8 C.F.R. 1208.13(b)(1)(iii)(A) and (B); see *In re D-I-M*, 24 I. & N. Dec. 448, 450 (B.I.A. 2008).

2. Petitioner is a native of the former Yugoslavia and a citizen of Serbia. Pet. App. B1-B2. He arrived in the United States on a nonimmigrant student visa in November 1994, and he filed an application for asylum and withholding of removal within two months of his arrival. *Id.* at B2-B3, D2. In March 1995, petitioner filed a second application for asylum and withholding of removal with additional documentation. *Id.* at B3. His principal claim was that he feared he would be persecuted upon his return to Serbia on account of his political opinion (specifically, his membership in the Serbian Renewal Movement), and he attached written statements to his applications to that effect. *Ibid.*

In June 2004, the Department of Homeland Security referred petitioner's asylum application to an IJ and at the same time initiated removal proceedings against him for remaining in the United States beyond the temporary period for which he had been admitted. Pet. App. B5-B6. On June 22, 2006, following a hearing on peti-

tioner's asylum application, the IJ denied petitioner's asylum application and ordered him removed from the United States. *Id.* at D22. The IJ found that petitioner was not credible, citing "inconsistencies, not only in the testimony in this case, but also in the documentary evidence which has been submitted." *Id.* at D13. Further, even assuming that petitioner was credible, the IJ further found that the government had successfully shown that changed circumstances in Serbia undermined any well-founded fear of persecution upon petitioner's return. *Id.* at D18.

On May 7, 2008, the Board of Immigration Appeals (Board) dismissed petitioner's appeal of the IJ's decision. Pet. App. C1-C4. The Board found no clear error in the IJ's adverse credibility determination in light of the inconsistencies between petitioner's testimony, his asylum applications, and his documentary submissions. *Id.* at C3. The Board also found that even if petitioner had been credible, he nevertheless failed to corroborate his claim of past persecution. *Ibid.* Finally, the Board determined that, even if past persecution had been established, country conditions had changed sufficiently such that petitioner no longer had an objectively reasonable fear of future persecution, and was thus ineligible for either asylum or withholding of removal. *Id.* at C4.

3. Petitioner filed a petition for review in the Sixth Circuit. On July 8, 2009, the court of appeals denied the petition for review. Pet. App. B1-B17. Although the court of appeals found that "several of the [IJ's] cited inconsistencies lack support in the record," *id.* at B12, the court of appeals concluded that one "fatal flaw" constituted substantial evidence supporting the IJ's adverse credibility determination. *Id.* at B13. Specifically, the court noted that petitioner gave three different accounts

of his alleged detention by secret Communist police in March 1991: in his written statement accompanying his asylum application, he stated that he was detained overnight; a document submitted as evidence of his membership in an anti-Communist political party stated that he was detained for nearly two weeks; and he testified at the asylum hearing that he was detained for three days. *Id.* at B13-B14. These discrepancies regarding the length of petitioner's detention, the court of appeals held, "go to the heart of his claim that he was persecuted." *Id.* at B14-B15 (internal quotation marks and citation omitted). Accordingly, the court held that nothing in the record compelled reversal of the agency's adverse credibility determination. *Id.* at B15. Moreover, the court of appeals agreed with the Board and the IJ that even if petitioner had proven past persecution, the government had "rebutted the presumption of a well-founded fear by showing that country conditions have changed dramatically." *Id.* at B17. Accordingly, the court denied the petition for review. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 8-12) that the court of appeals erred by failing to remand his case back to the agency to consider whether it would have made the same adverse credibility determination in light of the inconsistencies that the court of appeals found lacked support in the record. That claim does not warrant further review because the unpublished decision of the court of appeals denying the petition for review is correct and does not conflict with any decision of this Court or any other court of appeals.

1. Petitioner contends (Pet. 8-12) that the court of appeals' decision conflicts with a prior Sixth Circuit

opinion as well as a number of decisions from other courts of appeals. Specifically, petitioner contends that the court of appeals' decision violates the "ordinary remand rule," as applied by this Court in *INS* v. *Ventura*, 537 U.S. 12 (2002) (per curiam), and *Gonzales* v. *Thomas*, 547 U.S. 183 (2006) (per curiam), and embodied in several other court of appeals decisions.

Petitioner is wrong. The "ordinary remand" rule as applied in *Ventura* and *Thomas* concerned issues that the Board had not even considered in the first instance. See *Ventura*, 537 U.S. at 17 ("The BIA has not yet considered the 'changed circumstances' issue."); *Thomas*, 547 U.S. at 186 ("The agency has not yet considered whether Boss Ronnie's family presents the kind of 'kinship ties' that constitute a 'particular social group.'"). Here, the Board fully considered the IJ's adverse credibility determination and affirmed it. That the court of appeals disagreed with certain aspects of that adverse credibility determination does not render petitioner's credibility an entirely new issue that the Board must consider in the first instance. The decision below accordingly does not conflict with *Ventura* or *Thomas*.

Nor does the decision below conflict with any of the prior decisions of the Sixth and other circuits cited by petitioner (Pet. 10-12). As an initial matter, this Court does not exercise certiorari jurisdiction to resolve intra-circuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, there is no such conflict. In *Koulibaly* v. *Mukasey*, 541 F.3d 613 (2008), the Sixth Circuit remanded the case back to the agency only after concluding that the adverse credibility determination was not supported by substantial evidence. *Id.* at 624. The court did not indicate that the agency should reconsider its adverse credibility deter-

mination on remand; rather, the remand was to allow the agency to further evaluate the alien's eligibility for asylum *absent* the adverse credibility determination. *Ibid.* Similarly, in many of the decisions of other courts of appeals petitioner cites in support of an alleged conflict, the courts remanded to the agency for further consideration of the alien's asylum claim only after concluding that the record in the case compelled reversal of the agency's adverse credibility determination. See *Kueviakoe* v. *United States Att'y Gen.*, 567 F.3d 1301, 1306 (11th Cir. 2009); *Singh* v. *Gonzales*, 439 F.3d 1100, 1113 (9th Cir. 2006); *Butt* v. *Gonzales*, 429 F.3d 430, 438 (3d Cir. 2005).

Finally, contrary to petitioner's argument (Pet. 10-12), the court of appeals' decision does not conflict with the reasoning of *Kadia* v. *Gonzales*, 501 F.3d 817 (7th Cir. 2007), or *Li* v. *INS*, 453 F.3d 129 (2d Cir. 2006). In each of those cases, the court of appeals found serious errors in the reasoning behind the agency's adverse credibility determination, but also agreed that there were some inconsistencies in the alien's testimony. In each case, the agency's errors greatly outweighed the actual inconsistencies in number or in significance. See *Kadia*, 501 F.3d at 821 ("The immigration judge failed to distinguish between material lies, on the one hand, and innocent mistakes, trivial inconsistencies, and harmless exaggerations, on the other hand."); *Li*, 453 F.3d at 141 (noting that "there [was] little besides error in the IJ's decision" and that "no other aspect [but one] of his credibility finding is entirely beyond reproach"). Nevertheless, in recognition of the broad deference extended to the agency's factual findings, which might allow it to make an adverse credibility determination on the basis of the actual inconsistencies, the courts of appeals re-

manded for a renewed credibility determination. See *Kadia*, 501 F.3d at 821-824; *Li*, 453 F.3d at 136-137, 141-142.

On the other hand, the court of appeals in this case recognized that the "one fatal flaw" in petitioner's case served to sustain the IJ's and the Board's adverse credibility determination. Pet. App. B13. Because the court recognized that the significant discrepancies "regarding the length of [petitioner's] detention 'go to the heart of' his claim that he was persecuted by the police," *id.* at B14-B15, it affirmed the agency's adverse credibility determination because it was supported by substantial evidence, *id.* at B15. See also *Hamida* v. *Gonzales*, 478 F.3d 734, 738, 740 (6th Cir. 2007); *Li* v. *Ashcroft*, 378 F.3d 959, 964 (9th Cir. 2004). Petitioner has identified no case in which a court of appeals, despite agreeing with a principal inconsistency going to the heart of an alien's asylum claim, nevertheless felt constrained to remand back to the agency in light of its disagreement with other, more minor inconsistencies. Moreover, where, as here, a court of appeals does not announce or apply a rule of general applicability, a court's decision addressing whether the findings of fact in a decision of an IJ or the Board are supported by substantial evidence—including the specific findings of fact about whether the alien's testimony is credible—is fact-bound. The court of appeals' decision therefore does not give rise to any conflict that would justify exercise of this Court's certiorari jurisdiction.

2. Even if petitioner were correct that the court of appeals should have remanded the case after noting that some of the inconsistencies identified by the IJ lacked support in the record, this case would still not warrant this Court's review for a number of reasons. First, the

court of appeals' decision is unpublished and does not bind subsequent panels of the Sixth Circuit. See 6th Cir. R. 206(c). Second, petitioner's argument essentially amounts to a challenge to the court of appeals' application of a properly stated rule of law, which does not ordinarily justify exercise of this Court's certiorari jurisdiction. See Sup. Ct. R. 10.

Finally, even assuming the erroneous aspects of the agency's finding required a remand to make a new credibility determination, petitioner still would not be entitled to relief. As noted above, a proper showing of past persecution gives rise to a presumption of a well-founded fear of future persecution, but the government may rebut that presumption by showing a "fundamental change in circumstances" in the alien's country of origin that negates any fear of future persecution. See 8 C.F.R. 1208.13(b)(1)(i)(A). In this case, the IJ found that changed conditions in Serbia—specifically, the fact that Slobodan Milosevic is no longer in power and the government has changed significantly—undermined petitioner's fear of future persecution, Pet. App. D18-D19, and the Board agreed, *id.* at C4. The court of appeals affirmed that determination, *id.* at B16-B17, and petitioner does not renew his challenge to that determination in this Court. Accordingly, because the denial of petitioner's asylum application, and the court of appeals' affirmance of that denial, both rest on an alternative, unchallenged ground, this case does not warrant this Court's review.

3. Petitioner contends (Pet. 12-14) for the first time in this Court that the court of appeals should have remanded so that the agency could adjudicate a claim for "humanitarian asylum" under 8 C.F.R. 1208.13(b)(1)(iii)(B). This Court generally will not re-

view claims that were neither pressed nor passed upon below. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992). More fundamentally, because petitioner did not make this claim to the Board, the court of appeals and this Court have no power to review it. See 8 U.S.C. 1252(d)(1). Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
DONALD E. KEENER
JOHN W. BLAKELEY
Attorneys

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